pp. 5-8. Pursuant to certification of non-publication by the District Court of Appeal under the provisions of Rule 976, California Rules of Court, neither opinion is reported in the official reports. The order of the Supreme Court of California denying Petitioner's Petition for Hearing is printed in Appendix C hereto, *infra*, p. 9.

JURISDICTION

The District Court of Appeal of the State of California, First Appellate District, Division Three, first entered judgment in this case on May 14, 1965. A timely Petition for Rehearing was filed on May 28, 1965. The District Court of Appeal denied the Petition for Rehearing in an opinion filed June 2, 1965. Thereafter, on June 22, 1965, a timely Petition for Hearing was filed in the Supreme Court of the State of California. The Petition for Hearing was denied without opinion on August 11, 1965.

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code section 1257(3), since a right has been especially set up and claimed under the Constitution of the United States.

QUESTIONS PRESENTED

1. Is a free and voluntary confession by a suspect, who has neither requested nor been refused counsel, inadmissible in a state criminal trial by reason of the Constitution of the United States solely because the investigating officers did not advise the suspect of his right to consult with counsel and his right to remain silent?

2. Is a free and voluntary confession by a suspect, who has neither requested nor been refused counsel, inadmissible by reason of the Constitution of the United States because

the prosecution did not establish that the suspect at the time of the questioning made a knowing and intelligent waiver of both (1) his right to consult with counsel and (2) his right to remain silent?

STATEMENT OF THE CASE

On November 26, 1963, the District Attorney of Alameda County filed an information charging Elbert Earl Williams with murder in violation of section 187 of the California Penal Code (CT 1).[1]

A jury found Williams guilty of murder in the first degree (CT 3-7), and he was thereupon sentenced to the state prison for life (CT 8-9).

On appeal to the District Court of Appeal of the State of California, the conviction was reversed. Thereafter, that court denied Petitioner's Petition for Rehearing, and the Supreme Court of the State of California denied Petitioner's Petition for Hearing.

STATEMENT OF FACTS

The opinion of the District Court of Appeal of the State of California, First Appellate District, Division Three, contains an abbreviated summary of the evidence, which included testimony of eye-witnesses and an accomplice, testimony by Williams' companions as to admissions made by him, and confessions made by Williams to the police (Appendix A, *infra*, p. 1).

The essential facts may be summarized as follows:

Responding to a radio call, a police officer discovered sixty-three-year-old Patrick Byrnes badly beaten and lying

1. "CT" refers to the Clerk's Transcript and "RT" refers to the Reporter's Transcript of the proceedings in the state trial court, enclosed as part of the record.

upon a sidewalk in Oakland, California. Although medical attention was immediately summoned, the victim died within a few hours from extensive head injuries (RT 26-29, 33-36, 38-39).

Besides an accomplice who participated in the brutal beating and two girl companions who were with Williams and his accomplice during the evening of the murder, there were two other eye-witnesses who testified at trial (RT 7-25, 246-53). Within three days of the murder, the police had questioned Williams' accomplice and girl companions, learning as a consequence that Williams participated in the murder (RT 155, 177, 211-12). Williams was immediately taken into custody.

When first questioned by a special officer employed by the Oakland Police Department, Williams gave a general statement admitting his participation in the killing (RT 171-73). Shortly after this conversation, Williams was questioned in detail by an inspector of the Oakland Police Department Homicide Detail. Williams then made a full and detailed confession to his participation in the murder and robbery of Patrick Byrnes (RT 186-87, 189, 200-02). This confession was recorded, transcribed and introduced in evidence (RT 183-208).

Neither confession was found to be involuntary. Williams' claim that the special officer had threatened him (RT 239, 242) was controverted by the officer (RT 154-55, 157). And no objection was made to introduction of the confession in evidence. Nor did Williams challenge in any way the admissibility of the second, recorded, confession. In fact, this confession was received in evidence after defense counsel expressly declined to object to its introduction (RT 179, 208-09).

At no time during the interrogations did Williams request that he be permitted to consult with an attorney (RT 209).

Williams was not advised by the police that he had a right to counsel or that he had a right to remain silent (RT 169-70, 179). However, Williams did not testify that he was unaware of his right to consult with counsel, nor did he testify that he was unaware of his right to remain silent. Williams at no time claimed that he confessed because of any unawareness of his right to consult with counsel or his right to remain silent.

HOW THE FEDERAL QUESTION AROSE

The District Court of Appeal reversed Williams' conviction solely because it concluded that the admission of the second confession given to police in the absence of counsel and without advice as to right to counsel or right to remain silent violated the constitutional rule announced by the Supreme Court of California in *People v. Dorado,* 62 A.C. 350, 398 P.2d 361, *cert. denied,* 381 U.S. 946 (1965). (Appendix A, *infra,* pp. 1-2, 3.

An examination of the opinion of the Supreme Court of California in *People v. Dorado, supra,* makes it clear that the controlling issue in that case, and consequently in this one, arose under the Constitution of the United States.

The important federal constitutional question here presented by the District Court of Appeal's sole reliance on the *Dorado* rule was framed by the California Supreme Court's characterization of the case in *Dorado:*

> "The facts of the instant case bring it squarely within the rule of Escobedo with the exception that Dorado [and Williams in this case] did not retain or request counsel."
>
> . . . .

> "The question presented here, then, centers upon whether the failure of the accused to retain or request counsel justifies the application of a rule of law different from that established in *Escobedo*." *People v. Dorado, supra,* 398 P.2d at 367.

Having thus framed the federal constitutional question, the California Supreme Court proceeded to articulate in *Dorado* the answer which it concluded was compelled by this Court's decision in *Escobedo v. Illinois,* 378 U.S. 478 (1964):

> "Summarizing the principal issue on the confession, we must decide this case in conformity with the decisions of the Supreme Court of the United States. That court having declared the content of a constitutional right, it is our function to enforce it in situations wherever it logically applies. To do otherwise would, in effect, be to distort the United States Constitution itself.
>
> "We cannot say here that because defendant did not speak the words of a request for counsel we need not apply the United States Supreme Court decisions; the constitutional right does not arise from the request for counsel but from the advent of the accusatory stage itself. We cannot compress a constitutional right, expressed by the United States Supreme Court, into the shape of a frozen formalism." *People v. Dorado, supra,* 398 P.2d at 373.

The opinion of the Supreme Court of California makes it manifestly clear that the *Dorado* rule, which was the sole basis relied upon by the District Court of Appeal in this case, does not rest in any degree on a ground of state law. The decision of the District Court of Appeal in this case thus rests solely and expressly upon a federal constitutional ground.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

I. The Decision Below Represents an Unwarranted Extension of Escobedo v. Illinois, 378 U.S. 478 (1964), and Consequently Presents a Federal Constitutional Question Not Previously Determined by This Court.

In relying solely upon the rule announced by the California Supreme Court in *People v. Dorado,* 62 A.C. 350, 398 P.2d 361, *cert. denied,* 381 U.S. 946 (1965), the District Court of Appeal held that Williams was deprived of a federal constitutional right when his free and voluntary confessions were received in evidence against him, even without objection.

The question presented by the decision is whether the Constitution of the United States renders inadmissible a free and voluntary confession solely because of the absence of any warning to the accused of his right to consult with counsel and his right to remain silent, though the accused neither requested nor was refused counsel.

The California Supreme Court held in *Dorado* that the Constitution of the United States *compels* rejection of a free and voluntary confession when:

> "(1) the investigation was no longer a general inquiry into an unsolved crime, but had begun to focus on a particular suspect, (2) the suspect was in custody, (3) the authorities had carried out a process of interrogations that lent itself to eliciting incriminating statements, (4) *the authorities had not effectively informed defendant of his right to counsel or of his absolute right to remain silent, and no evidence establishes that he had waived these rights.*" (Emphasis added.) *People v. Dorado, supra,* 398 P.2d at 367.

This is the "*Dorado* rule" relied upon by the District Court of Appeal to reverse Williams' conviction here.

The *Dorado* rule represents an unwarranted extension of the constitutional rule enunciated in *Escobedo v. Illinois,* 378 U.S. 478 (1964). The opinion of this Court in *Escobedo* clearly indicated that the holding was dependent upon the circumstances there presented, and prominent among those circumstances was the refusal of the accused's request to consult with his retained counsel. That decision thus by necessity focused on the constitutional effect of a confession secured after a denial of a request for counsel upon a conviction based on that confession. Consequently, *Escobedo* held only that the state must honor a suspect's request to see his attorney during interrogation. See *Escobedo v. Illinois, supra* at 490-91.

However, the *Dorado* rule holds that the condition that an accused must have retained or requested counsel is a "formalistic distinction" *not permitted* by this Court's opinion in *Escobedo. People v. Dorado, supra,* 398 P.2d at 367. By completely rejecting a condition clearly relied upon by this Court as an element necessary to its holding in *Escobedo,* the *Dorado* rule creates an extension of the constitutional rule announced in *Escobedo* and, as a consequence, fashions a new right under the Constitution of the United States.

The District Court of Appeal felt compelled to reverse the conviction of Williams for the brutal murder which he voluntarily admitted to companions as well as the police. The sole ground upon which the reversal rests purports to be a rule demanded by the decisions of this Court. Petitioner asserts that neither the United States Constitution nor the decisions of this Court justify such a rule.

II. The Decision Below Is Contrary to the Decisions of Most State and Federal Courts on This Question and This Conflict Among the Courts Must Be Resolved in Order to Restore Stability to the Administration of Criminal Justice.

The writ of certiorari should also be granted because of the importance of resolving the conflict now existing between the decisions of both federal courts and highest courts of several states which have been presented with this important federal constitutional question.

The decision below, adopting the *Dorado* rule, which purports to delineate the limits of the constitutional standards pronounced by the decision of this Court in *Escobedo v. Illinois,* stands in conflict with numerous federal and state decisions.

Although this Court has denied certiorari in *Dorado,* it has also denied certiorari in *People v. Hartgraves,* 202 N.E. 2d 33 (Ill. 1964), *cert. denied,* 380 U.S. 961 (1965), an Illinois case which specifically rejected the *Dorado* rule.

Of the state courts which have been called upon to decide the extent to which *Escobedo* goes, only a very small minority has followed the rationale of the *Dorado* rule. These states are California, Oregon and Rhode Island, with possibly Massachusetts, Idaho and Tennessee following that general approach.[2] On the other hand, those states definitely rejecting the *Dorado* rule or its rationale include Illinois, Maryland, New Jersey, Alabama, New York, Nevada, Wis-

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2. *People v. Dorado,* 62 A.C. 350, 398 P.2d 361 (1965); *State v. Neely,* 395 P.2d 557 (Ore. 1964); *State v. Dufour,* 206 A.2d 82 (R.I. 1965) (alternative holding); *Commonwealth v. McCarthy,* 200 N.E.2d 264 (Mass. 1964); *State v. Hall,* 397 P.2d 261 (Idaho 1964) (concurring opinion); *Campbell v. State,* 384 S.W.2d 4 (Tenn. 1964).

consin, Pennsylvania, Ohio, Nebraska, New Mexico, Minnesota, Texas and Missouri.[3]

But the states are not alone in dispensing unequal justice in the name of the Constitution of the United States. The decisions of several of the United States Courts of Appeal are also in conflict. The Third Circuit has adopted a *Dorado* extension of *Escobedo*. *Russo v. New Jersey*, ... F.2d ..... (3rd Cir. 1964), No. 14833, issued May 20, 1965.[4] The Courts of Appeal for the Fifth and Seventh Circuits have rejected the *Dorado* rule. See *Edwards v. Holman*, 342 F.2d 679 (5th Cir. 1965); *United States v. Childress*, 347 F.2d 448 (7th Cir. 1965).

The clear conflict which now exists among both state and federal courts in the interpretation and application of such an important constitutional standard should not be suffered to exist. Confusion and unequal treatment will continue until this Court grants review and provides definitive guidelines for all jurisdictions.

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3. *People v. Kees*, 205 N.E.2d 729 (Ill. 1965); *People v. Hartgraves*, 202 N.E.2d 33 (Ill. 1964), *cert. denied*, 380 U.S. 961 (1965); *Sturgis v. State*, 201 A.2d 681 (Md. 1964); *State v. Naglee*, 207 A.2d 689 (N.J. 1965); *Woodard v. State*, 171 So.2d 462 (Ala. 1965); *People v. Gunner*, 205 N.E.2d 852 (N.Y. 1965); *Bean v. State*, 398 P.2d 251 (Nev. 1965); *Morford v. State*, 395 P.2d 861 (Nev. 1964); *State v. Burke*, 133 N.W.2d 753 (Wis. 1965); *Browne v. State*, 131 N.W.2d 169 (Wis. 1964); *Commonwealth v. Maroney*, 206 A.2d 288 (Pa. 1965); *McQueen v. Maxwell*, 201 N.E.2d 701 (Ohio 1964); *State v. Worley*, 132 N.W.2d 764 (Neb. 1965); *Pece v. Cox*, 396 P.2d 422 (N.M. 1964); *State v. Taylor*, 133 N.W.2d 828 (Minn. 1965); *Creswell v. State*, 387 S.W.2d 887 (Tex. 1965); *State v. Howard*, 383 S.W.2d 701 (Mo. 1964).

4. A serious conflict thus exists between the United States Court of Appeals for the Third Circuit and the highest state courts of New Jersey and Pennsylvania, both states within the Third Circuit.

CONCLUSION

Because the decision of the District Court of Appeal for the State of California, First Appellate District, Division Three, rests solely upon a rule erroneously claimed to be compelled by the decisions of this Court, and because of the serious conflict now existing among both state and federal courts which have considered the question, it is respectfully submitted that certiorari should issue to review the decision of the court below and thus preclude the possibility that a confessed murderer will escape punishment.

Dated: San Francisco, California

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(Appendices Follow)

Appendix A

In the District Court of Appeal of the State of California
First Appellate District, Division Three

1 Crim. No. 4705

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
vs.
ELBERT EARL WILLIAMS,
Defendant and Appellant.

OPINION

[Not to be published in official reports]

Appellant was convicted of first degree murder. The testimony shows that a man was beaten and kicked to death. An eyewitness saw two men at the scene, one going through the victim's pockets, the other kicking the victim in the head. Two girl companions of appellant testified that appellant had left them saying that "they needed some money," and returned saying he thought they had killed a man, and that he had gone through the man's pockets. He had money, which he had not had before. One Keith Williams testified that he was the second assailant, and described appellant's participation in the robbery.

At the trial, appellant testified that although he was present, he did not assist Keith Williams in the attack and that he did not take money from the victim. There were put into evidence, however, two statements by appellant to the police; and appellant claims that this was done in violation of the *Dorado* rule, because he was not told of his right to have counsel or to remain silent.

The Attorney General concedes that both statements were made at a time when appellant was in custody and sus-

picion had focused on him, but contends that *Dorado* does not apply because, says the Attorney General, the first statement was not obtained by a process that lent itself to eliciting incriminating statements, and the second, although concededly within the *Dorado* rule, was merely cumulative of admissible incriminating evidence. This evidence, says the Attorney General, consists not only of the testimony of prosecution witnesses, but also of the earlier statement and appellant's own testimony. The People admit that the second statement clearly is a confession. The confession includes the taking of money from the victim by force, which is robbery. The death of the victim followed, which produced the crime of murder.

As to the earlier statement, it is the position of the People that because not more than a few words were spoken to appellant by the police before he made his incriminating replies, there is not shown a process of interrogation designed to elicit inculpatory answers. It is exceedingly doubtful that this position is correct. The number of questions asked is not the only matter to be considered. All of the circumstances must be taken together, including the nature of the question or questions put to the suspect. Appellant had been in custody for two or three days. The police had statements from the other witnesses who later were to testify for the prosecution. The single question put by one interrogator, a special police officer, in the presence of a police inspector, asking appellant "why did he do it" would seem sufficiently designed to draw out inculpatory answers, to make the *Dorado* rule apply. The trial, however, was held before the rule of *Dorado* and, therefore, court and counsel did not direct attention to the circumstances of the interrogation, except in the matter of voluntariness. The sequence of questions is not quite clear from the rec-

ord. We do not, therefore, make a final ruling, binding on the trial court on a new trial, as to this first statement.

But even if the first statement were admissible, the conviction must be reversed. Section 4½ of article VI of the Constitution does not apply where the incriminating statement is a confession. (*People v. Dorado,* 62 A.C. 350, 368-369.) We find no reason for exception where the evidence for the prosecution consists partly of an admissible statement by the defendant. Moreover, the second statement, the confession, is more detailed than the first and supplies matter helpful to the prosecution. Appellant's testimony at the trial is not equivalent to a confession. To stand by a crime and not prevent it would not necessarily make the bystander a participant (1 Witkin, Cal. Crimes, p. 48), and this is what appellant testified he did.

There is still another reason why, even assuming the first statement to be admissible, the admission of the second was helpful to the prosecution and harmful to the defense, and it is this: Appellant challenged admissibility of the first statement on the ground that the special police officer threatened to "break my neck." He did not challenge the second statement, the more formal one, on the ground that it was involuntary.

No doubt the above reasoning as to the harmful effect of the second statement, a complete confession, is quite unnecessary in view of the *Dorado* ruling; it is at most cumulative.

The judgment must be reversed on the ground of *Dorado.*

Judgment reversed.

Devine, J.

We concur:

Draper, P. J.

Salsman, J.

Certification of Nonpublication

This opinion does not require publication in the advance sheets or official reports, under the standards provided by rule 976, California Rules of Court.

Draper, P. J.
Salsman, J.
Devine, J.

Appendix B

In the District Court of Appeal of the State of California
First Appellate District, Division Three

1 Crim. No. 4705

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
vs.
ELBERT EARL WILLIAMS,
Defendant and Appellant.

[Not to be published in official reports]

BY THE COURT:

Respondent petitions for rehearing, stating that the court ignored what respondent says was in fact appellant's first confession, made to Sylvia Grogans, and thus avoided meeting the impact of respondent's argument. By no means did we fail to consider the testimony of Sylvia Grogans, or any other testimony; but we have re-read respondent's original brief and we find, under the heading "Appellant's incriminating extrajudicial statements", pages 12-14, no mention whatever of the Grogans testimony. Nor, in the "Conclusion", does respondent refer to this testimony, but refers to the "admissible first statement" as being the earlier of two made to officers. The impact of respondent's argument was that this earlier statement to an officer, plus the very damaging evidence otherwise produced, (no doubt including, though not specifying the Grogans testimony) was sufficient for conviction without use of the later confession. But nowhere in the "Conclusion" or elsewhere in respondent's former brief is the Grogans testimony re-

ferred to as a confession which would so completely nail down the prosecution's case as to make superfluous the confession taken by the police.

Although we find the impact of respondent's arguments to have changed, we have reviewed the case in the light of the new emphasis, because of the newness of the *Dorado* rule, and because of [sic] the gravity of this case makes it proper for us to take up the point now accented by the People.

Respondent refers to the Grogans testimony as being a confession which had already (i.e., before either statement made to police or their representative) irreparably established appellant's guilt.

There is no doubt, under the cases, that the erroneous admission of a confession, as distinguished from a lesser exculpatory statement, is prejudicial per se. *People v. Schader,* 62 A.C. 751, 763; *People v. Stewart,* 62 A.C. 597, 607; *People v. Dorado,* 62 A.C. 350, 368; *People v. Matteson,* 61 Cal.2d 466, 469-470; *People v. Parham,* 60 Cal.2d 378, 385. It is said that a confession is an evidentiary bombshell which shatters the defense. (*People v. Schader,* supra at p. 766.) A *Dorado*-rule confession was admitted in this case. The conclusion seems inescapable.

But what if an earlier "bombshell", a complete confession made to others than the police, a confession as complete and authentic in every way as the inadmissible one, has already shattered the defense? It is doubtful that, under the above decisions, the second, the inadmissible, confession had been admitted, conviction could be affirmed, but we need not give an answer to such a problem. This is not such a case. The confession to the police supplied much more than did the testimony of Sylvia Grogans.

1. The instruction that an oral admission or oral confession is to be viewed with caution, as required by Code

of Civil Procedure section 2061, subdivision 4, no doubt would militate more against the testimony of the 17 year old girl (who neither worked nor went to school), given 4 months after the crime, than against the appellant's statement to the police, taken 2 days after the crime, and transcribed by a shorthand reporter and checked for accuracy by an inspector.

2. Appellant testified he had been drinking and was drunk, and that the girls, including Sylvia, had been drinking (as Sylvia, too, admitted) but, of course, appellant was as sober as those to whom he spoke during the confession to the police.

3. Sylvia Grogans' testimony upon the "confession" was not even introduced on direct examination. On cross-examination, she said that appellant said that Keith Williams "went crazy on the man" (this was appellant's defense, in his own testimony), and that appellant had said he thought they had killed the man. On redirect, she testified that appellant had said he had hit the man two or three times, and that he had kicked him. On re-cross she said she didn't hear "quite good" at the time.

4. Another girl was in the car, but she did not testify that appellant said anything about his personal kicking or striking the victim, although she did say he thought "we killed a man".

5. Appellant testified that he had told the girls that Keith went crazy, that he, appellant, thought the man was going to die, and that nothing more was said.

6. One defense theory, we gain from the arguments, was that there was no conspiracy to rob, and no robbery by appellant, and that, therefore, the most that there could be was second degree murder.

7. The district attorney argued to the jury at length the police confession, in which appellant says that, after demurring because of his condition, he agreed to get money, hit the victim and kicked him, and took money from his pockets; but he made reference only once to the remark made by appellant to the two girls.

Obviously, the police confession was exceedingly effective, and went far beyond the testimony of Sylvia Grogans.

Petition for rehearing is denied.

Devine, Acting P. J.

Dated: June 2, 1965.

Appendix C

ORDER DENYING HEARING

AFTER JUDGMENT BY DISTRICT COURT OF APPEAL
1st District, Division 3, Crim. No. 4705
In The Supreme Court of The State of California
In Bank

PEOPLE
v.
WILLIAMS

Respondent's petition for hearing DENIED.

McComb, J., Mosk, J., and Schauer, J., are of the opinion that the petition should be granted.

/s/ TRAYNOR
Chief Justice